United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

75-1251

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IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Respondent,

vs.

BERNARD TOLKOW,
Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT BERNARD TOLKOW (AND APPENDIX)

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INDEX.

TABLE OF CASES.

III.

STATUTES.

IV.

STATEMENT OF ISSUES PRESENTED FOR REVIEW.

1. Was there any proof that, as charged in the indictment, defendant violated the statutes by failing to list any loans by the Fund to debtors in which defendant had an interest?

2. Even assuming an affirmative answer to the question posed in No. 1, above, was there any proof that defendant's failure to report such loans was a "knowing" failure, as required by the statutes?

3. Did the district judge err in failing adequately and correctly to charge as to the statutory requirements of proof, particularly as to the "knowing" element, for a conviction?

4. Is the indictment void because the Special Attorneys who presented the case to the Grand Jury were not authorized so to do?

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Statement of the Case

This is an appeal by the defendant Bernard Tolkow from a judgment of conviction entered upon the verdict of a jury after a trial in the Eastern District of New York at which the Honorable Edward R. Neaher presided.

On April 15, 1975, the defendant was convicted of four counts of submitting false statements in annual reports required by the Welfare and Pension Plans Disclosure Act, as amended (29 U.S.C. 304) in violation of Title 18, United States Code, Section 1027, and sentenced to imprisonment for four months.

Notice of Appeal from the judgment of conviction was filed by the defendant on June 20, 1975 and the record on appeal was promptly docketed.

Facts

The relevant testimony is substantially undisputed.

It is conceded that defendant was one of the persons required to report as to loans made by the Fund to any "party in interest".

The charge made in counts IX to XII of the indictment is—to put it in simple language—that the word "NONE" found twice in Table 1 of Section D at page 14 of the enormously detailed 16 page reports (an excerpt is set out in our Appendix and the reports will be handed up to the court on the argument) was knowingly false since it did not include any statement as to the so-called Brightwaters and Harbor Planning transactions hereinafter referred to in more detail. There is no proof in this record that defendant ever read this report including Table 1 of Section D or ever had Table 1 called to his attention. It is not disputed in this record that these long reports, each containing great amounts of detail of all kinds, were prepared in toto by the accountant-witness Gruber, called by the Government, who testified that he had no recollection of ever calling any of the contents of the reports, including Section D, to defendant's attention, and that he had no reason to call it to defendant's attention. Gruber merely left them with a secretary for defendant's signature. The secretary (Miss Podolsky) testified that the reports were left with her by Gruber and that she merely handed them to the defendant for signature.

Defendant testified that his attention was never called to the contents of the reports and that he had no idea that he was under any obligation to make any report as to either the Harbor Planning or Brightwaters transactions. As we shall show hereafter, there is no proof that either of those transactions was such as was required to be reported.

In examining the relevant testimony, it must be remembered that defendant was acquitted of each of the first 8 counts of the indictment, all of which charged him with taking kick-backs. The trial transcript consists of several hundred pages of testimony (13 trial days) only a very little of which contains anything having to do with the four "reporting" or "disclosure" counts as to which defendant was convicted.

Likewise, there will be found in the judge's charge to the jury and in his supplementary instruction to the jury only a comparatively few paragraphs referring to those 4 "disclosure" counts. The summation for the defense discussed those counts only briefly and in passing, while the prosecutor's summation did not mention these 4 counts at all.

The Government's Evidence

With respect to the 4 "disclosure" counts on which defendant was convicted the Government's case came largely from the testimony of Robert W. Wendell who testified on four days: March 24, 25, 26 and 31, 1975. (The material described in the next two paragraphs herein do not refer directly to the "disclosure" counts but are included herein as background.)

In his testimony of March 24, 1975, Wendell stated that beginning some time prior to 1969 and continuing into 1972 he was engaged in the construction business primarily in and around the northern shore of Long Island, and more specifically in Suffolk County. Wendell's construction business was operated with a partner, one Al Fassnacht. During the 1960's they formed several corporations jointly owned by them, each of which corporations engaged in specific construction activities in Suffolk County, New York. Two such corporations, Salonga Homes, Inc. and Salonga Properties, Inc. were engaged in the mid-1960's in developing property in Suffolk County consisting of 52 lots under the

trade name "Colony Woods." In order to finance the Colony Woods project, beginning in 1965 Salonga Properties, Inc. borrowed from the Fund, of which fund defendant was a trustee.

Prior to 1969, the loans were arranged for by Wendell's partner, Fassnacht, through the Fund's attorney, Eltman. Thereafter, continuing through 1972, additional loans were made by the Fund to either Salonga Properties, Inc. or Salonga Homes, Inc., which loans were arranged through the defendant. Some of these loan transactions were the subject of counts one through eight of the indictment, which charged the defendant with accepting kick-backs with respect to these transactions. Defendant, it will be remembered, was acquitted as to all those eight kick-back counts of the indictment.

We come now to Brightwaters and Harbor Planning.

In his testimony of March 24, 1975 and March 31, 1975, Wendell described a meeting in April of 1969 between himself, Fassnacht and the appellant, in which Fassnacht asked defendant whether defendant knew of any person or persons who would be willing to invest money in one or more of the corporations owned by himself and Wendell. Defendant indicated he knew some people who would be willing to do so, but that the moneys were to go to a corporation that had not done business with the Fund, because defendant did not want any appearance that he was associated with the investment in any way. (Wendell testimony of March 31, 1975). It was arranged, according to Wendell, that funds obtained from the potential investors were to be invested in a corporation called Brightwaters Associates, Inc., jointly owned by Wendell and Fassnacht which had built an apartment house in Suffolk County, and which had never borrowed from the Fund. It was decided, Wendell testified, that defendant would arrange for an investment of $100,000 from three investors, not including himself, in exchange for which the three were to receive a

fifty percent interest in all of the Wendell enterprises including the Colony Woods development. About a week later the three met again and defendant delivered to Fassnacht two checks totalling $17,800, one from Mr. Gechtner, defendant's father-in-law and another from Herbert Kadison, the defendant's wife's brother-in-law. Fassnacht gave defendant two receipts from Brightwaters Associates, Inc. for the monies. On the same date, Murray Portnoy, a businessman who operated a labor relations consulting firm, delivered a check to Brightwaters Associates, Inc. in the amount of $10,000 and received a receipt. Wendell testified that thereafter, defendant delivered to Wendell and Fassnacht on seven separate occasions $47,200 and an additional $5,000 check from Murray Portnoy to Brightwaters Associates, Inc., bringing the total investment of the three men to $80,000.

Wendell testified that initially the monies received from these three investors were deposited in the account of Brightwaters Associates, Inc. Later, however, Wendell diverted the proceeds of these loans, he said, to Salonga Properties, Inc. in order to finance the Colony Woods project, and without notifying either defendant or any of the three investors.

In the summer of 1969, still according to Wendell, an agreement was reached to secure the $80,000 loan or investment by giving to the three men a deed to a piece of property called the Terry Road Property in Suffolk County. That deed was recorded on July 21, 1969.

In January of 1970, Gechtner, defendant's father-in-law, died. Thereafter, in the summer of 1970, so Wendell testified, he had discussions with defendant with regard to a series of building loans to finance additional houses in the Colony Woods development. Wendell testified that he and the defendant agreed that a series of building loans would be made by the Fund to Salonga Properties, Inc., each in the amount of $33,000. During those same discussions, defendant indicated,

according to Wendell's story, that the Brightwaters investors would like to begin receiving repayment of their investment. It was, he testified, agreed that following each new building loan a $3,000 payment would be made to reduce the $80,000 investment made by the three men. Upon receipt of the proceeds of each building loan, Wendell testified, he would draw a check to either Kadison or the latter's wife, and deliver that check to defendant. Nearly all such checks were made out to Rhoda Kadison, who testified that as part of an agreement made between herself and her sister to settle her father's estate, she endorsed the checks over to the Tolkows. (Mrs. Tolkow was her sister, daughter of Gechtner and wife of defendant.) Rhoda Kadison testified that this arrangement was agreed upon because she and her husband received from her father's estate the family home, and in exchange relinquished their right to proceeds of her father's investments. (Testimony of Rhoda Kadison of April 1, 1975).

In addition to the corporations owned jointly by Wendell and Fassnacht, Wendell with his wife owned all of the stock in Harbor Planning, Inc. which had been formed to build homes on the north shore of Long Island. In his testimony of March 25, 1975 Wendell said that in order to finance the initial stage of development, including the installation of roads, Wendell obtained a $45,000 loan from the Fund, secured by a second mortgage on the Harbor Planning, Inc. property. This loan was arranged between Wendell and the defendant. Wendell testified that the loan was repaid within three months. Thereafter, in the fall of 1970, Wendell approached the defendant for a large loan to enable him to purchase for Harbor Planning, Inc. property known as the Tide Mill Estates. After some negotiations, the two agreed that the defendant himself would loan Wendell $50,000 and, in exchange, would receive one-half of the stock of Harbor Planning, Inc. A formal buy-sell agreement was entered into dated November 13, 1970 (G.Ex. 85) which fixed the price of

Harbor Planning shares at $1800 per share. Thereafter, defendant invested $35,000 pursuant to the terms of the agreement.

In April of 1971, defendant called Wendell to ask if Harbor Planning Corporation ever had a loan with the Fund. Wendell then reminded defendant of the $45,000 mortgage of February 1970 to the Fund which loan had been paid off in its entirety prior to defendant's Harbor Fund investment in November of 1970. Wendell testified that defendant told Wendell that he (defendant) did not want to be part of any company which had had a previous investment with the Fund. Despite the fact that the Harbor Planning Corporation mortgage loan predated defendant's investment in that corporation, defendant resigned his position as secretary of Harbor Planning Corporation and placed his stock in escrow pursuant to an agreement dated April 3, 1971 (G.Ex. 90). That agreement said that the defendant would be paid $90,000 for the escrowed stock pursuant to a schedule of payments set forth therein. In his testimony of March 26, 1975 Wendell stated that approximately one year later, Wendell divested himself of ownership in the various corporations in favor of his attorney, Warren Ralph. At that time no payments had been made to defendant pursuant to the terms of the April 3, 1971 agreement. Defendant then entered into a formal agreement with Ralph whereby the latter was to repurchase defendant's stock for the sum of $96,000, of which only $25,000 was subsequently paid.

During his cross examination on March 31, 1975 Wendell admitted that at the time of discussions concerning the Brightwaters loan, he might have mentioned to defendant that funds obtained from the investors would be used to construct a medical building, and that at some point Wendell had sketches for such a building prepared.

Irving Gruber, a certified public accountant, called by the Government, testified that he was the accountant for Local

355 and the Fund. He prepared, on behalf of the Fund, the D-2 Reports to the Labor Department which form the basis for Counts IX through XII. The reports were prepared in Gruber's own handwriting from the records of the Fund and were left with defendant's secretary for signature by the defendant. None of the reports refer to any of the corporations controlled by Wendell. Gruber testified that he never asked any of the Trustees of the Fund, including the defendant, whether they had any interest in corporations to which the Fund made loans, principally because he did not think any of the trustees had the financial ability to make investments. Moreover he did not discuss the requirements for completing the D-2 form with the trustees (testimony of Gruber, a *Government* witness).

On April 7, 1975, Murray Portnoy, a labor relations consultant, testified that in approximately April of 1969, he had a conversation with defendant in which they discussed Portnoy's investment in a real estate venture. He testified that the defendant described the venture as a vehicle for achieving capital gains and that his father-in-law was investing in it. Although Portnoy testified he did not recall the exact conversation, he did state that he asked the defendant whether there was a way to use the venture to convert his corporation's investment into cash for his own use, and that it was agreed that he would write a check for the amount of the loan against his corporation's funds and would receive in return cash in the same amount from defendant. Portnoy further testified that on April 11, 1969 he met in his office with the defendant and Fassnacht and Wendell. At that meeting Portnoy was given a drawing that related to the property, and tendered a check for $10,000 as his share of the loan (G. Ex. 54). He further testified that within a few days from the date he delivered the check, he received $10,000 in cash from defendant. Portnoy testified also that subsequent to the meeting, he called the defendant and suggested converting an additional

check for $5,000 into cash and that he did so by delivering a check to the defendant and receiving cash in return. Portnoy also testified that both checks were carried on the books of his corporation as a loan to Brightwaters Associates, Inc. Portnoy testified also that after the delivery of these checks, he met the defendant at a diner and executed a deed (G.Ex. 93) transferring title to some property that secured the loan from himself, Gechtner and Kadison to Wendell. He testified he signed the deed and shortly thereafter was approached by the defendant who requested that he sign a second deed because Gechtner had died leaving his real estate to defendant's wife and the new deed was necessary to clear title to the property. Portnoy testified that he refused to sign the second deed because he did not want his name to appear on the same document with the defendant's wife. He further testified that the signature of his name which appears on Government Exhibit 95 is not in his own handwriting.

In addition to the foregoing, Portnoy was allowed to testify, over defense objection, that he met the defendant in a diner in April of 1973 following a phone call from the defendant requesting the meeting. He stated that at the meeting defendant told him that the Kadisons had both been subpoenaed by the Grand Jury and that Portnoy would be next. Portnoy testified also that the defendant attempted to influence his testimony by urging him to state before the Grand Jury that his (Portnoy's) investment in Brightwaters was still on the books of his corporation because he still had confidence in the investment, while the other members of the defendant's family had lost confidence and had withdrawn their money.

Evidence for Defendant

Aside from the testimony of various character witnesses, the defendant's case, at least with respect to the four

"disclosure counts" consisted exclusively of defendant's own testimony on April 8 and 9, 1975. Those parts of defendant's testimony which are relevant to the "disclosure counts" are summarized below.

In his testimony on April 8, 1975, defendant confirmed that Wendell had asked him, at a meeting held in April of 1969, whether defendant knew anyone who would be willing to invest in an income-producing venture which involved the construction of a medical center. According to defendant, however, and contrary to the testimony of Wendell, defendant and Wendell were the only persons present at this meeting. Furthermore, defendant testified that, neither at this meeting nor at the subsequent meetings in which this investment was discussed, was the name "Brightwaters" or "Brightwaters Associates" ever mentioned. Nor was mention made of the 50 percent interest which the "investors" would be given in the various Wendell enterprises. On his direct examination on April 8, defendant denied ever asking Wendell whether the company in which this investment was being made had received any loans from the Fund, and during his cross examination on April 9, defendant similarly denied that he ever insisted that his name not appear on any document relating to the investment. According to defendant, the question of his name appearing on any document relating to the investment never came up for the simple reason that he was not himself one of the investors.

Some time shortly after the above meeting with Wendell, defendant notified Wendell that he had located two potential investors, namely, Hyman Gechtner, defendant's father-in-law, and one Murray Portnoy. An investment was subsequently made by these three although, as defendant explained, Gechtner asked that the income from part of the monies which he was investing be paid to his (Gechtner's) son-in-law, Herbert Kadison. In any event, defendant testified that Mr. Gechtner invested only his own monies and, as far as

Portnoy's investment is concerned, defendant flatly denied that he ever gave Mr. Portnoy money to invest, or that he in any way used Mr. Portnoy to cover up monies which he (defendant) himself was investing.

After an aggregate investment of $80,000 had been made by Gechtner and Portnoy, defendant asked Wendell whether some arrangement could be made to secure the investment. Shortly thereafter, Wendell tendered to defendant a deed to certain property which defendant believed to be the property on which the medical center would be built. Furthermore, because defendant told Wendell that he had no idea of the value of the property to which the deed related, Wendell also signed and delivered to defendant an agreement whereby Wendell promised to repurchase the property for the sum of $120,000.

Several months later, and shortly after Mr. Gechtner died in January 1970, defendant told Wendell that he would like Wendell to repay the money that Gechtner had invested. He explained to Wendell that, because the investment now belonged to Mr. Gechtner's daughters (*i.e.*, defendant's wife and Rhoda Kadison), he felt that they should be in a position to decide what was to be done with the money. It was therefore decided that the deed which had been given to the Fund would be reconveyed to Wendell, and that periodic payments (representing a return of the Gechtner investment) would be made. In fact, a repayment program was inaugurated and, as explained *supra*, a series of checks from Wendell to either Rhoda or Herbert Kadison were delivered over a period of time beginning in August of 1970 and running through June of 1971. Defendant denied ever telling Wendell that he wanted a part or all of the Gechtner investment returned to the Kadisons out of monies to be made available by the Fund to one or more of Mr. Wendell's companies. Defendant denied also any knowledge as to whether Mr. Portnoy ever received money back from his investment. Defendant denied

also any past or present knowledge of any loan by the Fund to an entity known as Brightwaters Association.

With respect to defendant's $50,000 investment in Harbor Planning Corporation, defendant testified that at no time either prior to or during the period of his investment did he know that Harbor Planning had ever received a loan from the Fund. In fact, defendant testified that he did not become aware of any loan by the Fund which predated his own investment, until some time after his indictment. Furthermore, defendant stated that his decision in the spring of 1971 to terminate his investment was made, not as Wendell testified, because any past or then outstanding loans had been brought to his attention, but because he had become concerned that Wendell might be transferring monies from one corporation to another.

Finally, and with regard to the D-2 reports themselves, defendant corroborated the testimony of the Government's witness, Irving Gruber, to the effect that all of the reports in question were prepared entirely by Gruber and that the completed but unsigned reports were left with Mrs. Podolsky. Although defendant admitted signing each of these reports, he stated that, before bringing the reports to him to be signed, Mrs. Podolsky would "clip them to indicate where his signature was necessary". And, because he relied on Gruber to prepare the reports correctly, defendant did not feel it necessary to, and in fact did not, read them.

POINT I

The District Judge committed reversible error in failing to instruct the jury fully and correctly as to the requirements of proof for a conviction on these reporting counts, and, particularly as to the meaning of the word "knowing" in the statute.

"If justice is to be done in accordance with the rule of law, it is of paramount importance that the court's instructions be

clear, accurate, complete and comprehensive, particularly with respect to the essential elements of the alleged crime that must be proved by the government beyond a reasonable doubt * * *" (U.S. v. Clark, 1973, 2nd Circuit, 475 Fed. 2d 240, 248; U.S. v. Howard, 2nd Circuit, 1974, 506 Fed. 2d 1131, 1134).

The accusation in counts IX-XII is that defendant violated 29 U.S.C. 306 by "knowingly" concealing, covering up and failing to disclose facts required by 29 U.S.C. 306 to be disclosed, to wit, that the Fund had loans to Wendell—controlled corporations in which defendant had an interest.

Obviously, a key word in the statute and in these counts is "knowingly". The Congress carefully included a requirement that the false statement or failure to disclose must be a knowing one. At the very least, that added requirement means that there must be proof beyond a reasonable doubt that the defendant had actual knowledge of the duty to report, or at least proof of the high probability of such knowledge and a subsequent failure to comply; *mens rea* is an essential (see Lambert v. California, 1957, 355 U.S. 225; Morrissette v. U.S., 1952, 342 U.S. 246).

The meaning of "knowing" in criminal statutes has been studied and announced by this court in a series of recent decisions, among which are:

U.S. v. Tarantos, 1972, 455 Fed. 2d 877, 880
U.S. v. Jacobs, 1973, 475 Fed. 2d 271, 287
U.S. v. Brawer, 1973, 482 Fed. 2d 117, 128
U.S. v. Bright, slip opn., May 21, 1975

The sum of those holdings is this: while direct proof of knowledge is unnecessary and circumstantial evidence may suffice, the jury must understand that to convict it must find beyond reasonable doubt that there in fact was knowledge; negligence or foolishness is not enough; nor is it enough, to prove "knowledge", that there was a reckless disregard of the

fact to be "known"; reckless disregard must be coupled with a conscious purpose to avoid learning the truth.

Requirements of proof, and therefore of instructions to the jury, as to "knowingly" were expressed even more stringently in U.S. v. Squire, 1971, 440 Fed. 2d 850, 851, where this court wrote that in order to convict

> "it was necessary for the jury to find either (1) that Squires had read the form and was aware of a high probability that he was prohibited by the cited statutes from receiving a firearm in interstate commerce, or (2) that he deliberately avoided reading the form and that, if he had read it, he would have been 'aware of a high probability' that he was prohibited by the cited statutes from receiving a firearm in interstate commerce."

The lack in our case of any proof at all of those requisite elements is demonstrated in this brief under "Facts" and in our Points II, III and IV. In this Point I we will show that the district judge's charge to the jury failed to meet the requirements of the decisions of this court.

The district judge's instructions to the jury (see our Appendix) called the jury's attention to the necessity for proof of a failure "knowingly" to disclose. But when he proceeded to define and explain that word and that necessity, he omitted a number of the essential elements thereof, as set out in the opinions of this court on the precise subject:

In substance he told the jury:

> —That the act must be done voluntarily and purposefully and not because of mistake or accident (this of course helped not at all because there had been no claim or suggestion of any "mistake" or "accident").
>
> —That knowledge may be proven by conduct or circumstances (no reference of any sort to what he meant by "conduct" or "circumstances" in this case).
>
> —That no one may avoid "knowledge" by closing his eyes to facts prompting him to investigate.

Apparently the district judge took bits and pieces from several of the reported decisions (including U.S. v. Sheiner, 1969, 410 Fed. 2d 337, 340) but the result was a failure to give the jury any real help or relevant advice.

At least one absolutely essential element was completely omitted from the charge. In defendant's requested instruction No. 30, the court had been specifically asked to tell the jury of the necessity of proving "that the defendant knew that he was required to disclose the existence of such loans in the D-2 reports". That instruction was not given in any form nor did the charge contain the slightest suggestion that there must be proof that defendant *knew that he had a duty to disclose.*

The absence of that essential caveat licensed the jury to conclude that defendant could be convicted even if he never knew or heard of the duty to disclose loans. This of course was of highest importance especially since two Government witnesses, and defendant himself, had all sworn that defendant did not prepare or even examine or read the forms, but signed them as handed to him, and accountant Gruber, called by the Government, testified that he never inquired into or talked to anyone about the matter since he assumed there were no such "party in interest" loans.

If, as everyone testified, the duty to disclose plus the possible existence of such loans, was never inquired into by Gruber or called to defendant's attention, defendant's failure to disclose would not only be non-criminal but would be entirely innocent. Yet the district judge failed to grant another request contained in the same set of requested instructions: that he tell the jury that an act is not done "knowingly" if done by mistake or accident "or by virtue of some other innocent reason".

There was in this case no claim of mistake or accident. But everything in the record on the subject said that there was an "innocent reason" that is, the failure of the accountant to discuss the matter.

Even if it could somehow be held that the instructions in the main charge as to "knowingly" were correct and adequate, any such holding would fall on examination of the judge's final instructions to the jury.

Consider now the very last thing the jury heard (see our Appendix). The court at that point told the jury that it had to decide whether the Brightwaters investment was by defendant or by Gechtner and Portnoy, and whether at the time defendant made his Harbor Planning investment, he was aware of any past or present Harbor Planning loans from the Fund.

The total effect of these several instructions was that the jury was left completely at large to do what it would as to counts IX-XII.

The result could have been foreseen. Although the jury's verdict of acquittal as to counts I-VIII (alleged kickbacks) showed a complete disbelief of Wendell, the only incriminating witness, the jury then proceeded to convict defendant as to the reporting counts. The jury must have gotten from the charge the idea that, somehow or other, defendant must be guilty on Counts IX-XII simply because the report he signed said "None" whereas he had some activity with respect to Brigntwaters and Harbor Planning.

The Charge as to Defendant's Credibility

The court erred, too, in its instruction to the jury as to its approach to defendant's testimony.

The court told the jury:

> "The law permits a defendant at his own request to testify on his own behalf. The testimony of an individual defendant is before you. You must determine how far it is credible. The deep personal interest which every defendant has in the result of his case should be considered in determining the credibility of his testimony.

> You are instructed that interest creates a motive for false testimony; that the greater the interest, the stronger is the temptation, and that the interest of the defendant is of a character possessed by no other witness and is, therefore, a matter which may seriously affect the credence that should be given to his testimony."

This could mean only that defendant was more likely, than other witnesses, to lie. The court held in U.S. v. Mahler, 1966, 363 Fed. 2d 673, 678, that (absent countervailing instructions not given here) such a charge is unfair. In U.S. v. Howard, 1970, 433 Fed. 2d 505, 512, the District of Columbia Court of Appeals said that such a charge "is to be avoided" (see also Taylor v. U.S., 8th Circuit, 1968, 390 Fed. 2d 278, 285 and U.S. v. Saletko, 1971, 7th Circuit, 452 Fed. 2d 193, 197). In the Taylor case, Judge (now Justice) Blackmun, recommended that a defendant's evidence be not thus singled out.

This faulty instruction in our case on this subject may well be an additional explanation of why the jury, having acquitted defendant on the major accusations as to numerous kickbacks, convicted defendant on the *malum prohibitum* reporting counts. Confused or misled as to the "knowingly" requirement, the jury in considering defendant's denials, remembered the judge's charge (in effect) that a defendant more than any other witness, is likely to lie.

POINT II

There was no substantial proof that defendant had any interest in the "Brightwaters" transaction: therefore, the trial court erred in instructing the jury that it could find defendant guilty for failure to disclose an interest in Brightwaters.

As to Brightwaters, the theory of the prosecution was that defendant owned an interest in the Brightwaters Corporation

and that therefore he was required to report that fact since the Fund had outstanding loans to Brightwaters. There was no proof whatever that defendant owned any such interest. Perhaps this can best be demonstrated by referring to the charge to the jury by the District Judge (the charge is set out in full in our Appendix). The Judge charged the jury as to the Brightwaters matter:

> "You will recall also that there was evidence of an investment in a corporation known as Brightwater Associates. It would appear from the evidence that this was an investment of non-union funds on behalf of relatives of the defendant and one Murray Portnoy. There is evidence tending to show that the defendant was the actor throughout in arranging for the contribution of the money and its eventual repayment by Wendell and subsequently Warren Ralph. It would appear that some of the repayment came out of funds advanced to other corporations controlled by Wendell and/or Warren Ralph which had received loans from the Security Division."

The Judge thus told the jury, quite clearly and accurately, that the proof was that although defendant concededly was active in arranging this Brightwaters investment, "this was an investment of non-union funds on behalf of relatives of defendant and one Murray Portnoy." This indeed was what the evidence showed and the jury therefore had no basis on the evidence and the Judge's own charge to find that this was an investment by defendant and therefore reportable under the statutes.

However, when the District Judge came to answer a question from the jury later on, he told them that one of the issues the jury had to decide was

> "whether the Brightwaters investment was an investment on the part of the defendant or on the part of other people, Gechtner, Portnoy, and you understand that you have to decide that."

So the jury, having been correctly told that the evidence was that Brightwaters was not defendant's investment although he helped to arrange it, was told again at the very end of all the instructions that it was the jury's duty to decide whether this was an investment by the defendant or by the three other people. "Particularly in a criminal trial, the Judge's last word is apt to be the decisive word" (Bollenbach v. U.S., 1946, 326 U.S. 607, 613). Back came the jury with the guilty verdict as to counts IX to XII. There was, as we have seen, a misdirection as to Brightwaters. Each of the indictment counts 9 to 12 included without differentiation the Brightwaters and Harbor Planning transactions and the jury's guilty verdict as to these counts did not distinguish between the two transactions.

It necessarily follows that not only was there an erroneous charge as to Brightwaters, but an unfounded verdict. As we shall show in Point IV herein there was a similar total lack of proof as to Harbor Planning. Therefore the indictment must be dismissed as to counts IX to XII.

POINT III

Even assuming that defendant had an interest in "Brightwaters" and a statutory duty to report as to Brightwaters, there was no proof of any kind, direct, circumstantial or otherwise, or anything justifying an inference that his failure to report the Brightwaters transaction was "knowing" as required by the Statute (18 U.S.C.A. 1027). The Government's own proof was to the contrary.

The testimony, described herein under our heading: "Facts" contains nothing that could rationally support jury findings that defendant himself not only owned an interest in Brightwaters but was guilty of a "knowing" failure to report

it. The sole testimony was that he was active, at the request of people on both sides of the Brightwater investment, in getting the parties together and helping in the arrangements. Suspicion there might possibly be that he was really an undisclosed principle, but proof there is not.

Even if we by-pass the lack of proof of defendant's ownership in Brightwaters, there is still no evidence of the statutory element of "knowing". Putting it another way, there is nothing to justify a finding that the insertion of the word "None" in the D-2 forms was with defendant's knowledge or consent, or that he knew the questions and answers were there on page 14, or that he was ever asked or told about the matter in any way.

No citation of authority is needed for the basic proposition that every element of an alleged crime must be proven beyond a reasonable doubt. Surely this is no less mandatory as to a crime *malum prohibitum,* and a statute penalizing the failure to report a non-criminal fact, such as a party-in-interest loan.

POINT IV

The trial court erred in instructing the jury that it could find defendant guilty because of a failure to report as to transactions with the Harbor Planning Corporation, since the record shows that defendant was not aware of any such reportable transactions, and in fact, there were none.

Here, too, there was not only a failure to prove the alleged party-in-interest loan from the Fund, but another failure, also, to prove that the non-reporting, if reporting was conceivably necessary as to Harbor Planning, was a "knowing" failure.

According to prosecution witness Wendell (see our "Facts" herein) the Fund had earlier made a loan to Harbor Planning, which was paid off after a few months. In late 1970 (still according to Wendell's testimony) defendant himself loaned Harbor Planning $50,000 with half the stock of that corporation as security and with a buy-sell agreement, etc. A few months later, testified Wendell, defendant inquired as to whether the Fund had ever made a loan to Harbor Planning. Wendell, he testified, reminded defendant of the 1970 loan, long since paid off. Defendant (Wendell's testimony) said he did not want to have any part of any company which had borrowed from the Fund. Defendant thereupon resigned as secretary of Harbor Planning, placed his Harbor Planning stock in escrow and made a written agreement to sell the stock to Wendell (this obligation was later assumed by Ralph and the consideration was paid, in part only).

Defendant's testimony was that he made the Harbor Planning loan-investment, but that he never knew (until after the indictment that the Fund had ever made a loan to Harbor Planning.

Accepting in full Wendell's version, the fact still is that, when defendant made his personal loan to Harbor Planning, there was no outstanding loan by the Fund to Harbor Planning. Thus, as to Harbor Planning, there was no party-in-interest loan to report.

Of course, as in the Brightwaters matter, there is no proof that defendant made any "knowingly" false report as to Harbor Planning. He never read the reporting form, or knew of it or of the "None" answer written into it by Gruber.

POINT V

The indictment is void and should be dismissed on the ground that the "special attorneys" who presented to the Grand Jury that the cases which resulted in these indictments had no authority so to appear and present such cases to the Grand Jury.

Trial counsel for defendant moved before the trial to dismiss the indictment "on the grounds that the Special Attorneys who took part in the presentation of the cases to the Grand Jury were neither properly nor adequately appointed nor authorized so to act", citing United States v. Crispino, 2/13/75, 74 CR 932 (S.D.N.Y.) wherein the indictment was dismissed on those same grounds. The Government, opposing that motion, in the present case, handed to the court copies of "letters of appointment" for Special Attorneys Michael Pollack and Richard Shanley. As we understand it, these letters of appointment did not include authorization to these attorneys (certainly not to both of them) to proceed as to the reporting counts in this indictment, which of course are the only counts on which this defendant stands convicted. We understand that the Crispino case and probably some other cases dealing with the same subject matter are pending before this Court so appellant now preserves the point by renewing the motion to dismiss the indictment herein on this ground.

Permit us to add this. In opposing the motion to dismiss above referred to, the Special Attorneys argued that, regardless of anything else, an indictment should not be dismissed on this ground unless there is some showing of prejudice to the defendant from the appearance of unauthorized attorneys. This attempted answer to the motion for dismissal misses the point entirely. It is an honored ancient rule that, to preserve the secrecy and other essential elements of Grand Jury procedure, no unauthorized person may be present in the

Grand Jury room. To say that this good rule may be ignored unless there is a showing of prejudice to the putative defendant is to destroy the rule itself, and the principle behind the rule (see 28 U.S.C.A. 515a; and the eloquent language in United States v. Edgerton, 80 Fed. 374, 376).

Conclusion

The judgment should be reversed and the indictment dismissed, because:

1. In the testimony, which is substantially undisputed, there is no proof at all (certainly no substantial proof) of either of the two essential elements of the crimes charged. There is no showing either as to Harbor Planning or Brightwaters that as to the times referred to in counts IX-XII of the indictment (set out in the Appendix), there were loans outstanding from the Fund to corporations in which defendant had an interest. As to the other element: "knowingly", there was likewise, no proof at all of any knowing failure to disclose such loans.

2. The District Judge committed reversible error, most prejudicial to defendant, by failing to include in his instructions to the jury a correct and adequate definition and application of the statutory word "knowing" (the statutes and the court's instructions are set out in the Appendix).

3. The indictment is void because the case was presented to the Grand Jury by lawyers acting for the Government who had no authority so to do.

September, 1975

Respectfully submitted,

CHARLES S. DESMOND,
Attorney for Defendant-Appellant,
15 Court Street,
Buffalo, New York 14202,
Telephone 716-856-8500.

APPENDIX

The Indictment

(Only counts IX to XII are involved on this appeal.)

Count IX

"On or about the 17th day of June, 1970, in the Eastern District of New York, BERNARD TOLKOW, in documents required by the Welfare and Pensions Plans Disclosure Act, as amended (Title 29, United States Code, Section 304), to be published, that is, copies of the annual report of the Amalgamated Local 355, United Welfare Fund Plan, an employee welfare and pension plan, established and maintained jointly by employers and an employee organization in an industry affecting commerce, did knowingly conceal, cover up and fail to disclose a material fact, the disclosure of which was required by such Act (Title 29, United States Code, Section 306), to wit, the fact that the report failed to disclose fund loans in Part 4 Section D of the annual report (party in interest) to corporations controlled by Robert W. Wendell in which the defendant had an interest (Title 18, United States Code, Section 1027)."

(Counts X, XI and XII are the same as above except as to the dates of the alleged violations described in those three counts).

The Statutes

Title 18, U.S.C.A. Section 1027

"Whoever, in any document required by the Welfare and Pension Plans Disclosure Act (as amended from time to time) to be published, or kept as part of the records of any employee welfare benefit plan or employee pension

benefit plan, or certified to the administrator of any such plan, makes any false statement or representation of fact, knowing it to be false, or knowingly conceals, covers up, or fails to disclose any fact the disclosure of which is required by such Act or is necessary to verify, explain, clarify or check for accuracy and completeness any report required by such Act to be published or any information required by such Act to be certified, shall be fined not more than $10,000, or imprisoned not more than five years, or both."

Title 29, U.S.C.A. Section 306 (so far as applicable)

"(D) a detailed list of all loans made to the employer, employee organization, or other party in interest, including the terms and conditions of the loan and the name and address of the borrower."

Table 1. Investments

List here all investments held at year end in bonds or stocks of parties-in-interest, which are not listed or registered as described in footnote [1], and in mortgage loans or other property. (Include identity of each security, mortgage loan or property. Give name of party-in-interest and relationship.) [2] (1)	Cost (2)	Present Value (3)	Percentage of Total Funds (Assets) (4)
	$ NONE	$	
Provide, for the total investments in party-in-interest stocks, and bonds listed and traded or registered, as described in footnote [1] and not requiring identification, information required in columns (2), (3), and (4).	$ NONE	$	

(The above is a reproduction of part of page 14
from each of the annual reports)

The Charge to the Jury

"The third group consists of counts nine through twelve inclusive. Those counts charge the defendant with separate violations of another provision of the Welfare and Pension Plans Disclosure Act, which requires that an annual report be made to the United States Secretary of Labor disclosing certain information required by law concerning the affairs of a union pension fund. Those counts charge the defendant with having filed reports during 1970, 1971 and 1973, which failed to disclose that union pension fund loans had been made to corporations controlled by Robert W. Wendell, in which the defendant allegedly had an interest."

"Now let us turn to the third and last group of counts in the indictment. As I have already indicated, those counts, numbered 9 through 12 inclusive, charge the defendant with knowingly concealing and failing to disclose in D-2 reports loans made by the Security Division to corporations controlled by Robert Wendell in which the defendant allegedly had an interest. The reports in question were required to be filed with the United States Department of Labor for the years 1969, 1970, 1971 and 1972.

Before you can find the defendant guilty of the offenses charged in Counts Nine, Ten, 11 and 12 of the indictment, you must find beyond a reasonable doubt that all of the following elements have been established:

1. That the United Welfare Fund submitted Annual Reports to the United States Department of Labor (D-2 Reports), which included the activities of the Security Division, for the years 1969, 1970, 1971 and 1972.

2. That the defendant signed the foregoing reports on behalf of the United Welfare Fund and its Security Division in his capacity as a officer (Secretary-Treasurer), Trustee or administrator.

3. That during the time periods covered by the Annual Report submitted, there were loans made or outstanding by the Security Division to corporations controlled by Robert Wendell in which the defendant had an interest.

4. That at the times the defendant signed and submitted the Annual Reports to the United States Department of Labor he knowingly failed to disclose in such reports the existence of such facts.

As in the case of the other counts, there are certain matters which are not really in dispute on the evidence before you. The defendant has admitted signing the reports in question and I instruct you as a matter of law that the defendant, as an officer and trustee of the Welfare Fund and its Security Division, was a "party in interest" as defined in the law. That designation "party in interest", refers only to his position and capacity in the union; it has nothing to do with the allegations that he had an interest in corporations allegedly controlled by Robert Wendell. That is something else again.

The issue of whether or not the defendant had an interest in corporations controlled by Wendell, which he would have been required by law to disclose, is a sharply disputed issue of fact which you will have to determine on the evidence before you. For example, you will recall that there was considerable testimony and documentary evidence consisting of mortgages and checks relating to loans from the Security Division to one or more corporations controlled by Robert Wendell.

Were any of those corporations controlled by Wendell? "Control" is defined as the power or authority to manage,

direct, superintend, or administer the operations of a business including those in corporate form. Another question indeed the key question, is whether the defendant had an interest in any of Wendell's corporations. An interest can be right to or ownership of intangible property such as profits from a particular venture. It can extend even to a portion of the property or profits, and can be concealed or disguised.

You will recall also that there was evidence of an investment in a corporation known as Brightwater Associates. It would appear from the evidence that this was an investment of non-union funds on behalf of relatives of the defendant and one Murray Portnoy. There is evidence tending to show that the defendant was the actor throughout in arranging for the contribution of the money and its eventual repayment by Wendell and subsequently Warren Ralph. It would appear that some of the repayment came out of funds advanced to other corporations controlled by Wendell and/or Warren Ralph which had received loans from the Security Division. There is also evidence tending to show that another investment was made by the defendant directly in a corporation known as Harbor Planning Incorporated, in which Wendell's wife and the defendant became stockholders. There is evidence tending to show that this relationship persisted until sometime in 1972, although the defendant had decided to terminate it earlier after discovering that Harbor Planning had been advanced a loan by the Security Division in early 1970 which however had been repaid before the defendant made the investment.

I remind you that the defendant has not been charged with a violation of the reporting statute on the basis of his initial 1970 investment in Harbor Planning Corporation, even in the light of Harbor Planning's prior loan from the Security Division. What is charged is that, during the time the defen-

dant's investment continued, Harbor Planning secured a loan from the Security Division which was then required to be reported. You will have to determine whether any of these transactions created an interest as I have defined that term by the defendant in any of the corporations controlled by Wendell, which at one time or another during the period in question had loan transactions with the Security Division.

I also remind you that the offense is not having private investments of this type as such, but the failure to report them if the corporations involved have or had loans from the union during the year the D-2 report covers.

You will, of course, have to be satisfied beyond a reasonable doubt as to your determinations on the question of the defendant's interest, for if you are not, then you must aquit him on the third group of counts. If you do find beyond a reasonable doubt that the defendant did have an interest and that the corporations in question were the beneficiaries of loans from the Security Division, then you will have to determine whether or not the defendant knowingly failed to disclose his interest in these transactions and that their omission on the D-2 reports was not inadvertent or mistaken. As I have said twice before, the word "knowingly", as used in the crimes charged means that the act was done voluntarily and purposely and not because of mistake or accident. However, you must bear in mind, that knowledge may be proven by a defendant's conduct and by all the facts and circumstances appearing from the evidence. No person may intentionally avoid knowledge by closing his eyes to facts which should prompt him to investigate.

Knowledge and intent exist in the mind. Since it is not possible to look into a man's mind to see what went on, the only way you have for arriving at a decision in these questions is for you to take into consideration all the facts and cir-

cumstances shown by the evidence including the exhibits, and to determine from all such facts and circumstances whether the requisite knowledge and intent were present at the time in question. Direct proof is unnecessary. Knowledge and intent may be inferred from all the surrounding circumstances.

As far as intent is concerned, you are instructed that a person is presumed to intend the natural and probable, or ordinary, consequences of his acts.

Now, you have heard me say more than once, that you must decide this case upon the evidence. There are two kinds of evidence, direct and circumstantial.

Direct evidence is where a witness testified to what he saw, heard and observed, and what he knows of his own knowledge, that which comes to him by virtue of his senses.

Circumstantial evidence is where facts are established from which, in terms of common experience, one may logically infer other facts that are sought to be established. A common example is we are all in this courtroom, no windows, we don't know for sure what the weather is like outside, but in walks a man with a coat and an umbrella, there is water on it. We might immediately jump to the conclusion that it is raining outside and that's what we mean by drawing an inference from another fact. The man with the raindrops on his coat and umbrella indicates that outdoors although it may have been sunny when we got here it's now raining. Do you understand? Circumstantial evidence if believed is of no less value than direct evidence, for in either case you must be convinced beyond a reasonable doubt of the guilt of the defendant. In this case the Government relies upon both direct and circumstantial evidence."

Appendix—The Charge to the Jury.

(In answer to a question from the jury the District Judge gave the following additional instruction.)

"I assume you have in mind that one of the issues of fact you have to decide is whether the Brightwaters investment was an investment on the part of the defendant or on the part of other people, Gechter, Portnoy, and you understand that you have to decide that. Secondly, with respect to Harbor Planning, you have to decide whether at the time that the defendant entered into that transaction, he was aware of any loan that had been made in the past, or whether there was a loan in fact, at the time. You understand that?"

AFFIDAVIT OF SERVICE BY MAIL

State of New York)
County of Genesee) ss.:
City of Batavia)

RE: U. S. A.
v
Bernard Tolkow
Docket No. 75-1251

I, Leslie R. Johnson being duly sworn, say: I am over eighteen years of age and an employee of the Batavia Times Publishing Company, Batavia, New York.

On the 9 & RJ. day of September, 1975 I mailed 2 copies of a printed Brief and ~~in~~ Appendix the above case, in a sealed, postpaid wrapper, to:

Lauren S. Kahn, Esq.
c/o T. George Gilinsky
P. O. Box 899
Ben Franklin Station
Washington, D.C. 20044

at the First Class Post Office in Batavia, New York. The package was mailed Special Delivery at about 4:00 P.M. on said date at the request of:

Charles S. Desmond, Esq.
15 Court Street, Buffalo, New York 14202

Leslie R. Johnson

Sworn to before me this

8 day of September, 19 75

Audrey J. Fay

AUDREY J. FAY
Notary Public, State of N. Y. Genesee County
My Commission Expires Mar. 30, 19 77